Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

LUCILLE CHRISTIE BLAKLEY
AND THE BLAKLEY TRUST,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the district court can reject sworn testimony in support of standing in an action for wrongful levy under 26 U.S.C. § 7426(a)(1), thereby permitting the IRS to keep extrajudicially seized property without proving a nexus between the seized property and the alleged delinquent taxpayer?

PARTIES

Petitioners are Lucille Christie Blakley ("Ms. Blakley") and the Blakley Trust (the "Trust"), of which Ms. Blakley is the sole beneficiary. Petitioners were the plaintiffs in the underlying action filed in the United States district court for the Western District of Texas and were the Appellants in the Fifth Circuit Court of Appeals.

Respondent is the Internal Revenue Service of the United States of America. Respondent was the defendant in the underlying litigation and was the Appellee in the Fifth Circuit. Respondent is referred to herein as the "IRS" or "Respondent."

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PETITION FOR WRIT OF CERTIORARI

Petitioners Lucille Christie Blakley ("Ms. Blakley") and the Blakley Trust respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit dated February 6, 1998. The Fifth Circuit's opinion affirmed a judgment of the district court that refused to recognize Petitioners' standing to sue for wrongful levy under 26 U.S.C. § 7426(a)(1). In doing so, the district court rejected sworn testimony and other evidence regarding Petitioners' ownership and possession of property prior to its seizure. Had the district court given the appropriate weight to this evidence of ownership and possession, standing would have been recognized, and the IRS would have been required to prove a "nexus" between the alleged tax-debtor (Ms. Blakley's son) and the property seized. Instead, despite evidence of ownership and possession, the district court permitted the IRS to levy on almost 4000 items of personal property valued at over $3 million without ever having to prove such a nexus.

OPINIONS AND ORDERS DELIVERED BELOW

The opinion of the Fifth Circuit Court of Appeals dated February 6, 1998, was a per curiam affirmance of the district court's Memorandum Opinion and Order. It was not reported, but is reprinted in the Appendix hereto at App. 1.

The Memorandum Opinion and Order of the United States District Court for the Western District of Texas

dated September 12, 1996, is not reported and is reprinted in the Appendix hereto at App. 2.

JURISDICTION OF THIS COURT

This petition for a writ of certiorari seeks review of the February 6, 1998 decision of the United States Court of Appeals for the Fifth Circuit. Jurisdiction of this Court to review the decision of that court is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

26 U.S.C. § 6331(a).

> Authority of Secretary. If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary

makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

26 U.S.C. § 7426(a)(1).

Wrongful levy. – If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

U.S. CONST. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be

twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On November 7, 1994, the IRS seized almost 4000 items of personal property from three locations in Midland, Texas, owned and leased by the Blakley Trust (the "Trust"). The IRS claimed it was satisfying the alleged tax obligations of David Porras ("Mr. Porras") and William Edmiston ("Mr. Edmiston").[1] Mr. Porras is the son of Ms. Blakley, who is the sole beneficiary of the Trust and a Petitioner herein. Mr. Edmiston was the trustee of the Trust at the time of the seizure.

On November 14, 1994, Ms. Blakley and the Trust sued the IRS for wrongful levy pursuant to 26 U.S.C. § 7426(a)(1) in the United States District Court for the Western District of Texas. Petitioners claimed they owned most of the seized property, requiring its return. The IRS denied this, claiming instead that either Mr. Porras or Mr. Edmiston owned the property or that the Trust was holding the property as nominee for them.

[1] Mr. Porras is currently engaged in litigation with the IRS regarding his alleged tax obligations. To date, there has been no finding the Mr. Porras even owes any tax.

A bench trial began on June 5, 1995, and evidence was heard periodically over the next three months, concluding on September 1, 1995. During the trial, the majority of the testimony involved various witnesses, including Ms. Blakley, inspecting, identifying, and testifying with particularity regarding each of the 4000 seized items. Sworn testimony at trial established that Ms. Blakley, who was eighty-two at the time, has been an avid accumulator and stockpiler of possessions since the 1940s. Over much of the last half-century, Ms. Blakley had earnestly pursued her passion of acquiring jewelry, silver, china, crystal, art, and antiques.

Sworn testimony also established that many of Ms. Blakley's numerous possessions were stored in a Midland condominium that was owned by the Trust in November 1994, with many of her other possessions stored at a warehouse and in an office leased by the Trust. The IRS admitted that it knew the property was in the Trust's possession – not Mr. Porras' – in November 1994, when the IRS raided these three locations.

Despite Ms. Blakley's detailed, sworn testimony and evidence regarding Ms. Blakley's and the Trust's ownership and possession of these items, the district court found that neither party had established an interest in the seized property sufficient to give them standing to challenge the seizure as a wrongful levy under 26 U.S.C. § 7426. Over a year after the conclusion of trial, the district court issued its Memorandum Opinion and Order on September 12, 1996. That opinion rejected all of Petitioners' evidence and dismissed Petitioners' suit for want of standing, holding that Ms. Blakley and the Trust had

failed to present sufficient evidence of "some" interest in the seized property.

Thus, without requiring any proof from the IRS, the court entered judgment for Respondent. Based upon this judgment and despite the fact that the IRS has not obtained an adjudication that Mr. Porras actually owes any tax, the IRS already has liquidated virtually all of the seized items without awaiting the outcome of this appeal. The decision of the district court was affirmed without opinion by a three-judge panel of the Fifth Circuit Court of Appeals. It is from this judgment that Ms. Blakley and the Trust appeal.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's Decision Endorses a Misapplication of the Law of Standing Articulated by this Court, Effectively Shifting the Burden of Proof in a Wrongful Levy Action from the IRS to the Innocent Third Party, Which Offends the Fourth and Fifth Amendments Of the United States Constitution and is Contrary to Opinions of the Ninth and Eleventh Circuits.

The Fifth Circuit's opinion endorses the district court's misapplication of the law of standing and erroneously shifts the initial burden of proof in a wrongful levy action from the IRS to the innocent third party. Contrary to opinions of the Eleventh and Ninth Circuits, the Fifth Circuit's decision creates a dangerous precedent by permitting courts to reject evidence of ownership and possession when deciding standing. Such a result blesses the extrajudicial seizure of property without requiring the

IRS to prove a nexus between the seized property and the alleged tax-debtor.

In this case, the IRS actively led the district court to this error, stating in oral argument that – despite the fact that the IRS seized the property without any adjudication of right – "We don't have to prove a thing." And they did not. While it is undisputed that the IRS has broad and awesome powers, its position in this case is untenable. A precedent that allows the IRS *carte blanche* to seize property in the possession of a third party without bearing the burden to prove a nexus between the property seized and the alleged tax-debtor is a misapplication of the applicable statutes and should not be allowed to stand. Indeed, it is likely that such an interpretation is unconstitutional, since it threatens the guarantees afforded citizens by the Fourth and Fifth Amendments to the United States Constitution.

This Court has long noted that the government may levy against "only the property of the person owing the tax," and not against the property of any third party. *See United States v. Kaufman*, 267 U.S. 408, 414 (1925) (IRS is not entitled to priority payment out of partnership assets for tax debt of individual partners). Accordingly, 26 U.S.C. § 7426(a)(1) was enacted to afford innocent third parties, such as Ms. Blakley, a remedy for wrongful levy. The Fifth Circuit itself has recognized that a person "whose property is confiscated by the IRS to satisfy another person's tax liabilities" has a remedy under § 7426. *Texas Commerce Bank – Fort Worth, N.A. v. United States*, 896 F.2d 152, 156 (5th Cir. 1990).

According to the Ninth Circuit, "Section 7426 contains two distinct prerequisites to its application: (1) the plaintiff must have an interest in or lien on the property at issue, and (2) the levy must be wrongful." *Flores v. United States*, 551 F.2d 1169, 1171 (9th Cir. 1977). The first requirement ensures standing and is met by proving some interest in the seized property. *Id.*

Similarly, the Eleventh Circuit has stated that the "correct legal principle" to apply in a § 7426 action is as follows:

> There was an initial burden on the taxpayer to show that he had title or *some other ownership* in the property and that the government had made levy on that property because of a tax assessment against another taxpayer, and that after such a showing had been made by the taxpayer, the burden then shifted to the government to prove a nexus.

Morris v. United States, 813 F.2d 343, 345 (11th Cir. 1987) (emphasis added).

The IRS "must justify its extraordinary action" by proving the connection between the tax-debtor and the property at issue. *Id.* at 345 (citations omitted). Indeed, the Ninth Circuit has also emphasized that "it seems highly appropriate for the government to bear the burden of persuasion on what is really the identical question raised by the terms of the statute – whether the levy is wrongful." *Id.* at 1175.

The Ninth Circuit also recognized that there were constitutional implications in any wrongful levy action:

> To so take property from the hands of an interested third party is more than simply to require an individual to pay taxes levied in due course against himself. The constitutional dimensions of this situation, under both the Fourth and Fifth Amendments, cannot be ignored.

Flores, 551 F.2d 1174.

In order to protect these constitutional considerations, it is necessary that "the Internal Revenue Service [have] probable cause at the time assets are initially seized to connect those assets to the taxpayer with outstanding taxes due." *Id.* at 1175.

> [I]t is equally necessary that the Revenue Service show that a nexus exists between the taxpayer and the property, or the permanent deprivation that has resulted from the seizure would be arbitrary and as a result offensive to the requirements of due process of law.

Id; see also, Valley Finance, Inc. v. United States, 629 F.2d 162, 171 n.19 (D.C. Cir. 1980), *cert. denied sub nom., Pacific Development, Inc. v. United States*, 451 U.S. 1018 (1981) (opining that no "constitutional problem arises" since "the Service must justify its extraordinary action in connecting a third party's property to the delinquent taxpayer").

As noted, the third party in a wrongful levy action bears the initial burden to establish standing by showing some interest in the seized property. Standing is a legal question that is reviewed *de novo* by appellate courts. *MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492, 497 (5th Cir. 1994); *United States v. $38,570 U.S. Currency*, 950 F.2d 1108, 1111 (5th Cir. 1992). This Court has made clear that

standing in federal courts does not require strict proof, but instead may be established by allegations of fact in the complaint or supporting affidavits. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49, 65 (1987); *see also Warth v. Seldin*, 422 U.S. 490, 501 (1975) (stating that when determining standing "both trial and reviewing courts must accept as true all material allegations of the complaint, and must construe that complaint in favor of the complaining party"). Indeed, this Court has specifically noted that "the Constitution does not require that the Plaintiff offer . . . proof [of standing] as a threshold matter." *Gwaltney*, 484 U.S. at 65.

The Fifth Circuit has also recognized that an affidavit is sufficient to prove ownership of a note for purposes of establishing standing to recover on a guarantee. *NCNB Texas National Bank v. Johnson*, 11 F.3d 1260, 1265 (5th Cir. 1994). Yet, in this case, the Fifth Circuit upheld the decision of the district court dismissing Ms. Blakley's case for want of standing, thereby upholding the district court's refusal to recognize sworn testimony and other evidence in support of standing.

One need only read the opinion of the district court to recognize that it misapplied the well-established principals of standing. Ms. Blakley and the Trust provided more than mere allegations of fact or affidavits of ownership; they provided actual sworn testimony of possession and ownership. Under this Court's recognized standards, such testimony is sufficient to establish Ms. Blakley's and the Trust's standing to assert a wrongful levy claim. *See Gwaltney*, 484 U.S. at 65. Instead, the district court rejected this testimony and required Ms. Blakley and the Trust to conclusively prove their standing. This was error.

Contrary to this Court's requirement that allegations of standing be taken as true, the district court engaged in an extremely fact-intensive analysis, judging the credibility, motivations, and believability of witnesses, including Ms. Blakley.[2] Such an analysis is not only contrary to the law regarding standing,[3] but also effectively prohibits a *de novo* review of the legal question of standing because the appellate courts are not equipped to rule on matters of witness credibility. The district court's opinion is clearly flawed in this manner and should be reversed.[4]

Moreover, both the Ninth and Eleventh Circuits have considered the issue of standing in connection with an action under 26 U.S.C. § 7426. Those decisions are in conflict with the Fifth Circuit's opinion in this case. The Ninth Circuit has explicitly held that if an innocent party

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[2] At one point during the trial, the district court required that Ms. Blakley model fur coats for the court, presumably so the judge could gauge whether, in his opinion, they fit properly.

[3] Indeed, the district court's factual analysis is akin to a court in environmental litigation, for example, refusing to grant standing to a plaintiff alleging that, as an avid swimmer and beach-lover, he has standing to sue beach polluters simply because, in the court's opinion, the would-be plaintiff looks too pale and weak to be a swimmer or beach-lover. Such an analysis clearly does not comport with this Court's holdings regarding standing.

[4] Undoubtedly, Respondents will assert that even if the district court had correctly applied the principles of standing, the result in this case would be the same. However, while the IRS may have be able to show a nexus for some of the seized items, it clearly could not do so for the vast majority of others. Despite this, the district court's opinion gave these items to the IRS. On remand, the result of this case with respect to such items undoubtedly would change.

is in possession of property at the time of the seizure, the standing requirement is satisfied. *Flores*, 551 F.2d at 1171. Similarly, the Eleventh Circuit has found that the mere testimony of the claimant that title to a house and vacant lot levied upon was actually held by him was sufficient to establish standing. *Morris*, 813 F.2d at 344.

Here Ms. Blakley provided sworn testimony regarding her ownership and possession of the property. Such sworn testimony ought not be subject to summary rejection by the trial court, but should establish Ms. Blakley's standing to bring a wrongful levy action as a matter of law. *Morris*, 813 F.2d at 344. In addition, Ms. Blakley's testimony was bolstered by photographs and other evidence including, at times, testimony from other witnesses establishing Ms. Blakley's interest in the property.

Ms. Blakley also presented evidence that the Trust owned the condominium and held the leases on the warehouse and office space in November 1994. The Trust was, therefore, in possession of the property at the time of seizure.[5] Under the Ninth Circuit's decision in *Flores*, this, too, is sufficient to establish Ms. Blakley's and the Trust's standing to pursue an action for wrongful levy. *Flores*, 551 F.2d at 1171.

This conclusion finds support in Texas law as well.[6] In Texas, "possession is the strongest indicia of ownership of personal property." *Continental Credit Corp. v.*

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[5] Interestingly, the IRS admitted at trial that it was aware before the raid that the property was in the Trust's possession.

[6] As this Court is aware, property rights are determined by state law. *See, e.g., Broday v. United States*, 455 F.2d 1097, 1099 (5th Cir. 1992); *see also, Texas Commerce Bank Nat'l Ass'n v. United States*, 908 F. Supp. 453, 456 (S.D. Tex. 1995) (stating that "state

Norman, 303 S.W.2d 449, 454 (Tex. Civ. App. – San Antonio 1957, writ ref'd n.r.e.). Indeed, possession of property is *prima facie* evidence of ownership. *Worth Tool & Die Co. v. Atlantis Elec. Corp.*, 398 S.W.2d 656, 657 (Tex. Civ. App. – Dallas 1965, writ dism'd). Ms. Blakley's and the Trust's evidence of possession coupled with the legal presumption of ownership should have been sufficient to establish standing under 26 U.S.C. § 7426. Certainly, Ms. Blakley showed "some" interest in the property sufficient to maintain an action for wrongful levy and to put the IRS to its burden of proof.

In light of Ms. Blakley's testimony and the other evidence presented, it is clear that the burden of proof was misplaced in this case. This conclusion is bolstered by the district court's opinion itself. The opinion stated, "the court has finally concluded that Plaintiffs have failed in their burden to show the requisite interest in any of the property . . . the court observes that the basic reason for its decision rests upon the finding that the seized property has always been under the dominion and control of Porras, the delinquent taxpayer." *See* App. 6. However, Ms. Blakley has only the burden to show "some" interest in the property. She does *not* carry the burden clearly placed on her by the district court., *i.e.*, to disprove Mr. Porras' interest in the property. Instead, the IRS is charged with the burden to prove Mr. Porras' interest in the property by showing the requisite "nexus" between Mr. Porras and the property. The district court, however, never required the IRS to meet this burden, but instead

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law controls in determining the nature of legal interest which the taxpayer has in property sought to be reached").

"centered its attention on the first step in the analysis of a wrongful levy claim: whether Plaintiffs have successfully proved 'some' interest in the seized property." *Id.*

Clearly, the district court's analysis misapplied the burden of proof, effectively requiring Ms. Blakley and the Trust to conclusively prove a lack of ownership on the part of Mr. Porras. Such a shift in the burden under 26 U.S.C. § 7426, creates constitutional concerns under the Fourth and Fifth Amendments of the United States Constitution. *Flores*, 551 F.2d at 1174. As this Court is aware, the Fourth Amendment protects citizens from "unreasonable searches and seizures," while the Fifth Amendment ensures that no person shall be deprived of property, "without due process of law." U.S. CONST. amend. IV; U.S. CONST. amend. V.

As the Ninth Circuit noted in *Flores*, the extrajudicial seizure of property raises questions of "constitutional dimensions" under the Fourth and Fifth Amendments. However, as the D.C. Circuit has opined "no constitutional problem arises" where the IRS is required to prove a nexus connecting the property seized to a delinquent taxpayer. *Valley Finance*, 629 F.2d at 171 n.19. Where, as here, the IRS is allowed to seize property without showing a nexus the implications of the Constitution cannot be ignored. In order to avoid such constitutional problems, this Court should grant this petition for a writ of certiorari to review the decision of the Fifth Circuit.

CONCLUSION

Petitioners request that this Court grant this petition for a writ of certiorari, reverse the decision of the Fifth Circuit affirming the district court's dismissal of Petitioners' claims pursuant to 26 U.S.C. § 7426, and remand the case to the Fifth Circuit to consider the question whether the district court's dismissal was proper.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50873

LUCILLE CHRISTIE BLAKLEY;
LUCILLE CHRISTIE BLAKLEY TRUST

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas, Midland
(MO-94-CV-224)

(Filed Feb. 6, 1998)

Before BARKSDALE, BENAVIDES, and DENNIS, Circuit Judges:

PER CURIAM:*

AFFIRMED. See Local Rule 47.6.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LUCILLE CHRISTIE BLAKLEY	§	
and LUCILLE CHRISTIE	§	
BLAKLEY TRUST	§	NO.
	§	MO-94-CA-224-F
v.	§	
	§	
UNITED STATES OF AMERICA	§	

MEMORANDUM OPINION AND ORDER
(Filed Sep. 12, 1996)

1.0. Background

In this action, Plaintiffs Lucille Christie Blakley ("Mrs. Blakley") and the Lucille Christie Blakley Trust ("Trust") pursue a wrongful levy suit against the United States under 26 U.S.C. § 7426. Although Plaintiffs state several claims in their suit, their main action is for wrongful levy.

Plaintiffs filed suit after the United States seized personal property located at a residence, warehouse and office complex in Midland, Texas. It is the Government's position that the property belongs to David Porras ("Porras") against whom the Government has assessed federal income tax deficiencies in the amount of $36,677,296.45 for the years ended December 31, 1984; December 31, 1985; December 31, 1986; and December 31, 1987. Plaintiffs take the position that most of the seized property belongs to them, not to Porras. Mrs. Blakley is the mother of Porras and the beneficiary of the Trust. The trustee of the Trust is William Edmiston ("Edmiston"), a

close personal friend of Mrs. Blakley and Porras and a long-time business associate of Porras.

In their suit, Plaintiffs set forth claims under theories involving (1) violations of constitutional rights, (2) conversion, (3) trespass, and (4) wrongful levy. They asked for an injunction requiring return of their property and prohibiting further seizure and for damages. After discovery and some preliminary hearings, the parties agreed to an early trial setting before the court.

Almost 4,000 items of personal property were seized in connection with this matter. Since it was not possible to bring all items into the courtroom for identification and discussion, most of the trial was conducted in a warehouse in Midland, Texas, where the United States stored the property. The process to view each item of property and to hear ttestimony [sic] about it took over four weeks, during the warmest days of the summer of 1995, in a facility where only a few small rooms were air-conditioned. The trial would have taken longer but the parties stipulated, in most instances, to divide equally property with an appraised value of under $50.00. Such a division was accomplished at time of trial and nothing further is necessitated for the court in that regard. After all testimony was completed, the court received briefs and heard oral arguments. The matter is now before the court for final decision. This Memorandum Opinion and Order constitutes the court's findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

2.0. Standard for Wrongful Levy

Before discussing the facts, the legal guidelines which govern a wrongful levy case should be set forth briefly. Under 26 U.S.C. § 7426, a third party (not the taxpayer) who claims an interest in property subjected to a tax levy can challenge the seizure in a "wrongful levy" action to recover the property. Here, Plaintiffs claim that they own most of the seized property. They argue that Porras, the delinquent taxpayer, has an interest only in a very small portion of the property. Consequently, they assert that most of the property should be returned to them.

To decide the matter, the court must undertake a three-step analysis. Initially, the Plaintiffs bear the burden to prove that they have some interest in the levied-upon property. *Morris v. United States*, 813 F.2d 343 (11th Cir. 1987); *Hill v. United States*, 844 F.Supp. 263 (W.D.N.C. 1993). Without any evidence of an interest in the property, the Plaintiffs have no standing to challenge the Government's levies and the case must be dismissed. *Comer Family Equity Trust v. United States*, 732 F.Supp. 755 (E.D. Mich. 1990).

The court has not found nor been cited to caselaw that provides a general analysis of the kind of proof that a plaintiff must produce to show "some" interest in the levied-upon property. Since the issue demands a detailed examination of the facts of each controversy, the cases concentrate on the specific, not the general. Reported cases indicate, however, that claims of "some" interest are normally buttressed by records and documents showing purchase, title, payment and the like. *See, e.g., Libutti v.*

United States, 894 F.Supp. 589 (N.D. N.Y. 1995). Consequently, when a plaintiff's claims are completely unsubstantiated by records or documents, as here, then a dispute arises as to whether there is any showing of "some" interest. Such a dispute has arisen in this case. Under the circumstances, the court is of the opinion that it must make a thorough inquiry into the first step of the required analysis to determine if Plaintiffs can prove they have "some" interest in the property. Without documents or records to view, the court must thus judge the Plaintiffs' evidence solely upon the credibility of their witnesses.

If the Plaintiffs can meet this initial threshold and establish that they have an interest in the property, then the burden shifts to the Government to prove a nexus between the taxpayer and the property. *Flores v. United States*, 551 F.2d 1169 (9th Cir. 1977). Since the Government may levy only against property owned by the pertinent taxpayer, the property levied upon is wrongfully seized if it "does not, in whole or in part, belong to the taxpayer against whom the levy originated." *Arth v. United States*, 735 F.2d 1190, 1193 (9th Cir. 1984). The Government has the burden to establish by substantial evidence the nexus or connection between the taxpayer and the property. *Morris v. United States*, 813 F.2d at 345. If the Government meets its burden by showing a nexus between the taxpayer and the property, then Plaintiffs must finally demonstrate by a preponderance of the evidence that the taxpayer has no interest in the property. *Hill v. United States*, 844 F.Supp. at 274.

2.1. Overview

In considering this case, the court has centered its attention on the first step in the analysis of a wrongful levy claim: whether Plaintiffs have successfully proved "some" interest in the seized property. After lengthy deliberation, including an additional review of the excellent arguments and briefs submitted by counsel for Plaintiffs, the court has finally concluded that Plaintiffs have failed in their burden to show the requisite interest in any of the property. Although the details of the court's ruling are set forth below, the court observes that the basic reason for its decision rests upon the finding that the seized property has always been under the dominion and control of Porras, the delinquent taxpayer. It is he, not the Plaintiffs, who has had possession of and has exercised all indicia of ownership over the seized property, often with a major assist from Edmiston. Hence, Plaintiffs' claims of wrongful levy fail. From this overview, the court now turns to its factual and legal analysis.

2.2. Factual Introduction and Credibility Determinations

Mrs. Blakley, born in 1912, is a vigorous and engaging woman. She married twice before her marriage to her present husband, Mr. Blakley. She has never worked outside the home in any significant way. She has never been an interior decorator. She has never declared substantial income on her tax returns.

Porras is Mrs. Blakley's only child, born of her first marriage. His adult life has been spent in the interior decorating business. Porras and Edmiston met in 1974,

began working together in the interior decorating business in 1977 and shortly thereafter began sharing living quarters at 28 Oaklawn Park in Midland, Texas. Edmiston still lives in the residence today. Porras, who lived there on and off until 1990, now lives in New Mexico. Like Porras, Edmiston has been assessed federal income tax deficiencies in substantial amounts.

The residence at 28 Oaklawn Park is a beautiful home and was beautifully decorated until the tax seizure. Government Exhibit 39, an article from the October 1977 issue of *Architectural Digest*, showcased the home in remarkable detail in both word and picture. Before the seizure, the residence was well-stocked with silver, china and crystal for use during the numerous, elaborate parties thrown by the two residents, according to Tom Simpson, an employee of Porras and Edmiston from June 1987 to May 1990. Simpson testified that much of the silver was either Gorham or Medallion, which Porras collected with a consuming interest. Dorothy Young, who also once worked for Porras, agreed that he collected fine silver. The residence included a Lalique table which Simpson took apart several times. The library was "loaded" with leather-bound books. Beautiful art hung on the walls. Porras particularly liked the French artist Eugene DeBlass. Bronzes, porcelains, obelisks and malachite furnishings were favorites of Porras, according to Simpson, and were

generously placed throughout the residence. Simpson testified that Porras called everything in the residence "his stuff."[1]

From the late 1970's through the middle of the 1980's, Porras was heavily involved in the Permian Basin oil boom. Before then, his interior decorating business was a successful one. After Midland and Odessa began to grow and prosper as oil prices increased dramatically, Porras borrowed millions of dollars to develop large office building projects in the two cities. According to Edmiston, Porras at one time during the period had a bank line of credit of $66,000,000.

Porras testified that for eight or nine years, until 1987 or 1988, he leased a Lear jet from GECC. Simpson testified that Porras also had two helicopters. For ground transportation, according to Simpson, Porras had in his possession at various times a Lamborghini, an Aston-Martin, a Jaguar, a Mercedes 560 SL, a Cadillac, a Bronco II, and a Wagonneer.

In 1979, Porras purchased a ranch called Pyramid Land and Cattle Company. Dedrick Baxter, an acquaintance of Porras and Edmiston, testified at trial that he attended cattle auctions at the ranch in 1984, 1985 and 1986 and was impressed with their extravagance. Elaborate bars and eating areas were arranged. Service was by crystal and china. Name entertainers performed. Fats

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[1] It should be noted that Plaintiffs objected to the admissibility of any out-of-court statements by Porras on the grounds of hearsay. This evidentiary issue is discussed in Paragraph 2.2 of this Opinion and Order.

Domino was scheduled for one performance, but some last-minute problem forced a cancellation. In the first auction he attended, Baxter saw Porras with a jeweled hat band.

Although Mrs. Blakley testified that she was a collector of art objects and fine furnishings, it is her son who has been the serious collector. Clear evidence of his appetite for collection comes from an article about a Dallas home he owned and decorated in the early part of the 1980's. The article, written by Lisa Ruffin, now Lisa Ruffin Harrison ("Ruffin"), appeared in the July/August 1981 issue of *Texas Homes*. On pages 101 and 103 of the article Ruffin noted:

> Porras is a great collector of everything: Chinese porcelain, sterling, rare books, crystal and glassware, acrylic and semi-precious metals and stones are only a conservative inventory of his ever-increasing cache. "I believe in lots of stuff," he laughs, indicating a crowded coffee table that would surely be a minimalist's nightmare, "lots of things to see and touch. With inflation, antiques are appreciating much faster than a savings account" he says, "and antique accessories are probably the best investment going. It's certainly nothing new; the Europeans have always put their money into things.

Although Porras disavowed the quotes attributable to him in the article, Ruffin testified at trial that she interviewed Porras for the article and that, to the best of her knowledge, the quotes were accurate. At no time did Porras ever contact her and deny the quotes or ask for any correction. Her testimony on the matter is credible; Porras's is not. Therefore, while Mrs. Blakley may have

collected odds and ends during her life, the evidence clearly shows that her son was the one in the family who amassed a vast store of property over the years, either for appreciation in value, for personal accumulation or for business. He had both the desire and the means to do so.

Ruffin also testified that, based upon her interviews with Porras, she understood the Dallas home and all its contents belonged to him. Most of the furnishings, paintings and art objects shown in the pictures accompanying the article were seized by the Government in connection with this matter and were viewed by the court at trial. None of the items shown in the article were identified by Porras in his interview with Ruffin as belonging to Mrs. Blakley or the Trust. Indeed, from a reading of the article, it appears clear that Porras considered the contents of the home to belong to him.

The Trust, of which Mrs. Blakley is beneficiary, was started by her father. It was the subject of much controversy and litigation over the years. Finally, in 1988, as a part of a settlement of pending litigation, the Trust was re-formulated and Edmiston was appointed the Trustee. One of Edmiston's early decisions as Trustee was to cause the Trust to get into the business of interior decorating. The Trust operated both out of a warehouse leased by one of Porras's companies, not by the Trust, and out of an office leased by another of Porras's companies, not by the Trust, with a phone listing bearing Porras's name, not the Trust's. Much of the property seized by the Government came from the warehouse and the office. The rest of the furnishings and art objects seized by the Government came from the residence at Oaklawn. In 1991, Porras conveyed the residence to the Trust.

Edmiston has never kept an inventory of the interior decorating property owned by the Trust. He testified that no records exist to substantiate the Trust's ownership of any of its properties. In addition, there are no cost records relating to any of the Trust property. Edmiston has never caused financial statements to be prepared for the Trust. He has never filed tax returns for the Trust. No gain has ever been recorded in connection with the sale of any Trust property. Although Edmiston does not operate or manage the Trust in accordance with normal business or accounting procedures, neither Mrs. Blakley nor Porras object to his management. Instead, they take the position that Edmiston has improved the Trust results since taking charge. This position seems somewhat unusual since the "improved results" have not translated into additional income for Mrs. Blakley. Her joint U.S. Individual Income Tax Return (Form 1040) showed total income of $10,793 for 1988; $10,783 for 1989; $9,482 for 1990; $596 for 1992; $1,255 for 1993; and $817 for 1994. The 1991 Return was not in evidence. *Government Exhibits 46 and 47.*

The lack of financial and accounting records for the Trust makes it impossible to determine whether the optimistic assessment of the performance of the Trust by Mrs. Blakley and Porras is valid; however, conventional business wisdom would cause a prudent observer to reject such an assessment. Still, Porras and Mrs. Blakley are supportive of Edmiston. Mrs. Blakley does not object to her diminishing reportable income. Nor does she question the decision by the Trust to compensate Porras and Edmiston for their services by paying their housing, transportation and per diem expenses on a periodic basis, rather than by paying them salaries or consulting fees.

Because of the nature of the management of the Trust by Porras and Edmiston, who together control the Trust's operation, either in name or in fact, there were suggestions at trial that the Trust was being conducted for an improper purpose. Dedrick Baxter testified that he sometimes dined with Porras and Edmiston at 28 Oaklawn Park. On one occasion, accompanied by his wife, he received advice from the two hosts to consider placing his property in Trust, as they had done. They explained that it was their way of insuring that their standard of living would never be compromised. Moreover, Simpson recounted that Porras said he could not hold anything in his name because of his problems with the Internal Revenue Service.

In this case, of course, the court is not required to make any judgments about Edmiston's fiduciary performance or Porras's role in that performance; the court is allowed, however, to examine the performance of both as it bears on the credibility of Edmiston on behalf of the Trust and on the credibility of Edmiston and Porras generally. In this regard, it is again worth repeating that it is contrary to normal protocols to do business without records. At trial, Porras and Edmiston failed to explain why they so consistently disregarded normal business practices. In addition to other matters, this lack of record-keeping severely eroded their credibility, especially in regard to claims on behalf of the Trust. At the same time, the court also observes that Mrs. Blakley had almost no records to support her claims of an interest in property. Although she did have cancelled checks, there were not enough to establish the widespread purchase of the volume of property claimed by her.

As the above discussion also indicates, much of the testimony of Mrs. Blakley, Porras and Edmiston was contradicted by other witnesses, all of whom were credible. In addition, Mrs. Blakley, Porras and Edmiston often contradicted each other, especially in regard to the particulars of property acquisition and ownership. There was ample room for contradiction with almost 4,000 items of property to identify, but the problem related less to sheer numbers and more to the tactic by Plaintiffs to claim as much property as possible, without regard to how sensible each individual claim was in relation to the facts. Such confusing, contradictory and inconsistent testimony substantially eroded the credibility of Mrs. Blakley, Porras and Edmiston. Their demeanor also caused credibility problems. For example, Mrs. Blakley was so obviously biased in favor of her son and so obviously hostile toward the Government that her testimony lost its balance. Her motivations are understandable, but they have caused the court in the end to reject almost all of her testimony.

2.2. Evidentiary Issue

Before addressing the property issues, the court will deal with a hearsay issue raised at trial. During the course of the proceedings, various witnesses testified about out-of-court statements by Porras. Plaintiffs objected because they took the position that Porras was not a party to the case and thus his statements were hearsay to them. The court admitted the testimony, reasoning that the statements by Porras were admissible because Porras had a community of interest with the Plaintiffs. Thus, his statements could be received as an admission of the

Plaintiffs. It is true that the interest of Porras is completely aligned with the two Plaintiffs. The mutual goal for all three is to defeat the Government's levy. Based upon his status as the delinquent taxpayer, however, Porras cannot join the suit as a plaintiff because he has no standing to challenge the levy.

Although the court's reason for admitting Porras's statements would have been appropriate under common law, the reason is not appropriate under the Federal Rules of Evidence because the common law rule was not incorporated in the Federal Rules. Professor Graham explains the issue well in his treatise, M. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6719 (Interim Edition):

> At common law statements by a person in privity with a party were receivable in evidence as an admission of the party. An admission by one jointly interested was also receivable at common law against others similarly interested.
>
> Rule 801(d)(2) alters prior law by omitting any provision declaring either a statement by a person in privity with another or by one of persons jointly interested to be an admission by the other or others. Thus Rule 801(d)(2) in excluding such statements from the definition of admissions adopts the position advocated by Morgan and the Model Code of Evidence that considerations of privity and joint interest neither furnish criteria of credibility nor aid in the evaluation of testimony. Statements formerly treated as a separate category of admission will, however, frequently qualify as representative admissions, Rule 801(d)(2)(C), or as statements against interest, Rule 804(b)(3), or fall within

> another hearsay exception. Other such statements will meet. the requirements of the other hearsay exceptions contained in Rules 803(24) and 804(b)(5).

Research after the trial unearthed Prof. Graham's excellent scholarship on this change made by the Federal Rules. The court still believes, however, that the statements of Porras were admissible, based upon Rule 803(24) rather than Rule 801(d)(2). Rule 803(24) states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance off [sic] the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Prof. Graham observes that, as structured, "Rule 803(24) contains five express requirements," which are (1) equivalent trustworthiness, (2) necessity, (3) material fact, (4) satisfaction of purpose of Rules and (5) notice. *See id.* § 6775. The court has considered all five of these requirements; each has been met here.

The first is an equivalent circumstantial guarantee of trustworthiness. The trial testimony of Porras had little guarantee of trustworthiness. His out-of-court statements were especially important in evaluating the unusual positions taken by him and the two Plaintiffs in this case. The Government's witnesses, the persons recounting Porras's out-of-court statements, with the possible exception of Tom Simpson, had no reason to lie or obfuscate. Simpson has had past difficulties with the Internal Revenue Service and, at the time of trial, was trying to resolve them. His credibility was attacked by Plaintiffs. Yet, in the court's opinion, Simpson as well as all of the government's other witnesses appeared by their demeanor and consistent testimony to be credible and trustworthy. Their testimony about each statement made by Porras was believable because the statements were made under circumstances which were not suspect in any way. Moreover, the court allowed Porras, if he wanted, to be present during all testimony and to hear each witness. At times, he was present in court; at other times, he was not. He was also available to be a witness, did appear and testify as a witness and was available for full examination.

As a second matter, the introduction of the hearsay statements was necessary because they were more probative on the point for which offered than any other evidence which the Government could procure. A good

example is Ruffin's testimony confirming her article about Porras's affinity for collecting things. Mrs. Blakley's testimony that she was the big collector in the family was not believable. Neither was Porras's denial of his appetite for collection. Based upon the totality of the facts, it only made sense that Porras, not Mrs. Blakley, was the serious collector in the family. Ruffin's confirming testimony was important to a full evaluation of the matter.

The third, fourth and fifth requirements of Rule 803(24) are also satisfied here, as this Opinion and Order illustrates in its applicable references to Porras's statements. Each statement was offered as proof of a material fact, so requirement three was met. In connection with requirement four, the general purposes of the Federal Rules of Evidence and the interests of justice were best served by the admission of each statement. Further in this regard, a trial is a search for the truth (Rule 102 of the Federal Rules of Evidence) and truth would have been a casualty in this case if Porras's testimony could not have been tested by his out-of-court statements. Finally, the fifth requirement of notice was met by the Government, in light of the Government's pretrial submission of its list of witnesses and in light of pretrial discovery. Because of Plaintiffs' lack of records, the Government worked diligently to "fill in the gaps" and Plaintiffs were well-aware of how the Government planned to proceed. Indeed, Plaintiffs did not complain about lack of notice in this regard and even filed a motion to strike Simpson's testimony.

2.300 Plaintiffs' Failure to Show Interest in the Seized Property

The court has already written that, as to the seized property, it finds that the Plaintiffs failed to show the requisite interest. To discuss the matter in some orderly fashion, the court now divides its analysis into categories of property. It should be noted that the claims of the Trust to an interest in the property are limited to the property discussed in the thirteenth category in Paragraph 2.313 below and listed in Appendix **M**. All other categories of property were claimed by Mrs. Blakley. In the order of presentation, the first category is "property belonging to others" (Appendix **A**); the second, "property not adequately identified or testified to" (Appendix **B**); the third, the "Sinclair property" (Appendix **C**); the fourth, "England-France purchases in 1981 (Appendix **D**); the fifth, "the Fur Coats" (Appendix **E**); the sixth, "Lalique furniture and furnishings" (Appendix **F**); the seventh, "books" (Appendix **G**); the eighth, "gifts" (Appendix **H**); the ninth, "jewelry" (Appendix **I**); the tenth, "coins" (Appendix **J**); the eleventh, "china, silver, crystal, flatware, glass, porcelain and pottery" (Appendix **K**); the twelfth, "property at 28 Oaklawn Park" (Appendix **L**); the thirteenth, "the Trust" (Appendix **M**); and the fourteenth, "Porras/Edmiston property" (Appendix **N**).

2.301 Property Belonging to Others

Plaintiffs stipulated by their testimony that 342 items seized by the Government belonged to others. This property, with a present value of $166,567.00, is listed at Appendix **A**. Plaintiffs agree that these items of property

belong to someone else, not either to Mrs. Blakley or the Trust. Thus, neither she nor the Trust have an interest of any kind in the property. If those who allegedly have an interest in the property wish to make a claim, they are certainly entitled to do so. However, as between the Plaintiffs and the Government, the Plaintiffs cannot prevail by showing that someone else, not them, has an interest in the property. Without an interest, Plaintiffs have no claim.

2.302 Property Disavowed, Not Adequately Identified or Not Testified To

At trial, Mrs. Blakley presented the court with an affidavit entitled "Affidavit of Lucille Christie Blakley in Support of Proffer of Evidence Pursuant to Rule 43 of the Federal Rules of Civil Procedure." In the affidavit, she listed each item of property which she claimed to be hers. Approximately seventy percent (70%) of the property seized by the Government was on the list. At trial, Mrs. Blakley could not support the proffer. When she tried to validate her claims of ownership during her testimony, she was basically unable to do so. For example, in some instances, Mrs. Blakley listed property in her affidavit as belonging to her and then unequivocally disavowed any ownership during her courtroom testimony. Illustrations would be too numerous to mention, but two are Items #1102 and #1103, pieces of pottery. In addition, at no time during the trial did Mrs. Blakley or anyone else ever explain how she had the means or the wherewithal to acquire the millions of dollars of property set out in the affidavit. Under the circumstances, it is neither expedient nor necessary for the court to discuss further Mrs.

Blakley's affidavit in the remainder of this Opinion and Order. The court should simply observe that the affidavit and list were contradicted too often to be accorded any weight whatsoever.

There were a substantial number of other instances where Mrs. Blakley testified (as opposed to listing by affidavit) that she had an interest in an item of property, but she did so with such hesitation or uncertainty that her own testimony was inadequate to show the interest, even when eventually she might declare the item to be hers. In other instances, Mrs. Blakley simply could not remember whether she had any interest in a particular item of property. Finally, there were also some items of property which were not the subject of any testimony. Therefore, as to these categories of property, including property disavowed, listed on Appendix **B**, totalling 1083 in number with a present value of $859,085.50, the court finds no interest was sufficiently shown.

Time and again, in trial, Mrs. Blakley would examine a particular item of property and then would state that "it's not mine." Such an admission ended further inquiry; no interest was shown. *See, e.g., Items #1102 and #1103.* At other times, she would state that "it looks like mine" or "I think it's mine" or "I believe it's mine" or "it may be mine" or "I have some like it" or "it's mine but I don't know how I got it, when I got it or where I got it" or "it's mine but I could be mistaken." *See, e.g., Items #857, #876, #897, #954, #992, #1054 an# #1442.* More often than not, this testimony would be given only after substantial hesitation or would be accompanied by testimony that Mrs. Blakley still "wasn't sure" about her interest in the property. *See, e.g., Item #1031.* At other times, her claimed

interest in property would be confusing, being clearly stated at one point and then disavowed at another, or directly contradicted by either Edmiston or Porras. *See, e.g., Item #915.* This equivocal testimony is not adequate to establish the necessary interest in property that a plaintiff must show in a wrongful levy case.

There were also items of property where Mrs. Blakley's responses to questions of interest were either "I don't remember it" or "I never used it" or "I'm not familiar with it" or "I don't recognize it." *See, e.g., Items #1048, #1051, #1975 and #1976.* Again, this kind of testimony cannot create an interest in the seized property.

Finally, there were other items of property seized by the Government about which no testimony was offered by Plaintiffs, either by Mrs. Blakley on her own behalf or by Edmiston on behalf of the Trust. *See, e.g., Items #885 and #975.* Without any showing of interest, Plaintiffs cannot prevail.

The fact that Mrs. Blakley was unable to identify a substantial part of the property she originally claimed as hers in her pleadings and her proffer erodes her credibility in this matter. Throughout this kind of testimony, Mrs. Blakley often gave the clear appearance of someone striving to establish something that had no real basis in truth. Her overriding goal in all this testimony was obviously to help her son.[2]

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[2] The court has struggled with overlap in this case. There are instances throughout this opinion where the court rejects the Plaintiffs' claimed interest in an item of property for two or more reasons. For example, there were some specific items of

2.303 The "Sinclair" Property

At trial Mrs. Blakley identified 133 items of property seized by the Government as belonging to her via her ex-husband Richard Sinclair. She married Sinclair in California in the 1960's. At some point in time, they separated and she moved back to Texas. Mrs. Blakley testified that, during the separation, Sinclair gave these 133 items to her for safekeeping. She further testified that Sinclair asked her to hold them until he notified her that he wanted them back. Later, before a divorce could be finalized and before some agreement about the property could be made, Sinclair died. Mrs. Blakley learned of his death after his funeral. Since no one ever asked for the property, she considered it hers.

On its face, this testimony is suspect. Experience teaches that, as a practical matter, one spouse separating from another in contemplation of divorce normally does not deliver property to the departing spouse for safekeeping. The testimony becomes even more suspect given the amount and value of the property. Appendix C shows the present estimated value of the 133 items to be

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Lalique glass in which Mrs. Blakley could not identify an interest. The court therefore rejected her claim under this Paragraph 2.302 of this Opinion and Order. At one point in her testimony, however, Mrs. Blakley made a general claim that all Lalique property was hers. That claim was rejected in Paragraph 2.306. Under the circumstances, a Lalique piece could be listed in Appendix B (2.202) and Appendix F (2.206). The court has tried to eliminate the overlap, although the large number of items makes it probable that one item may appear on more than one list.

$188,157.00. This is substantial in today's financial environment; if translated into 1960 figures, the total would be less but still substantial in relative terms.

Finally, if the items are examined separately, the incredulity of the testimony is accentuated. For instance, Mrs. Blakley testified that several large bronze pieces came from Sinclair. It would be highly unusual for such pieces to be casually given for safekeeping on a good faith understanding without any record to a soon-to-be-ex-spouse living over 1,000 miles away. Mrs. Blakley's testimony in this regard suffered further because one bronze piece, a man shooting an arrow (Item #1035), that she testified came from Sinclair, was identified by Dorothy Young, an ex-Porras employee, as coming from Porras's showroom in Leland Ingram in Dallas.

The assessment of the testimony does not end here, however. During cross-examination, Mrs. Blakley acknowledged that she testified in an earlier deposition that little of the property seized by the Government came from Sinclair. In her deposition, given on February 27, 1995, on pages 18-21, she answered as follows:

> Q. Did you acquire any property from him (Sinclair) that was included in the property the IRS seized?
>
> A. No.
>
> . . .
>
> Q. You said none of the property. Any of the property that the IRS seized, did any of that property ever belong to Mr. Sinclair?
>
> A. Yes, some of the jewelry.

. . .

Q. What jewelry would that have been?

A. It was a diamond ring, a nine-carat diamond ring, cuff links, gold chains.

Q. Aside from that jewelry, would there have been anything else during the marriage to Mr. Sinclair that would be included in the property the IRS seized?

A. I can't remember. I don't think so.

Mrs. Blakley's trial testimony varied widely from her deposition testimony on this point. Indeed, to change testimony so dramatically from February 1995 to the summer 1995 brings the subsequent testimony into serious question, especially when the subsequent testimony by itself is already flawed. Although, in her trial testimony, Mrs. Blakley did identify a diamond having come from Sinclair, that diamond listed in the inventory was five carats, not nine. Under all the circumstances, the court rejects any possibility that Mrs. Blakley could have an interest in the property shown in Appendix C.

2.304 England-France Purchases in 1981

Another example of Mrs. Blakley's lack of credibility relates to her testimony that she purchased 175 items for herself during trips to England and France in 1981. The present estimated value of those items is now $231,080. *See Appendix D.* Even adjusted for 1981 values, these purchases represent significant expenditures.

How Mrs. Blakley could have made these purchases is inexplicable. For her entire adult life, she has seldom worked. She has never developed any special job skills.

Although she has long been the beneficiary of the Trust, it has never produced any substantial income for her. For example, in the Trust Statement for the fiscal year ending 2/29/80, the assets totalled $339,099.25 and the yearly income totalled $21,967.12 *(Government Exhibit 17)*. In the Trust Statement for the fiscal year ending 2/28/82, the assets totalled $578,704.35 and the income totalled $21,572.44. *(Government Exhibit 18)*. The sole reason for the increase in assets between the two years was an increase in the appraised value of the real estate in the Trust, 100.427 acres of land in Collin County, Texas. Still, the income for most years in the 1980's was around $20,000, not enough to finance a spending spree in England and France.

Moreover, Mrs. Blakley's husbands have never had a large corpus of funds from which she could draw. She has been married at least three times, but none of her husbands was shown to have showered her with money. Although Mrs. Blakley testified that Sinclair was wealthy, her entire testimony as to him has no corroborating support in the record and must be rejected. Further, no evidence was adduced to show that her present husband, Blakley, to whom she was married in 1973, is or has been wealthy in his own right.

Mrs. Blakley also testified that her father was wealthy, gave her money and bequeathed to her a substantial sum after his death in 1950. She did not present any documentation or other corroboration for this testimony but, as usual, simply asked the court to take her word for it. There are further problems with this testimony in light of the Inventory and Appraisement of her father's Estate approved on April 27, 1950, showing her

father's community interest at death to be $25,736.97. *(Government's Exhibit 25, pp 11-13)* The court is not justified in accepting Mrs. Blakley's word on this matter.

Assuming that Mrs. Blakley actually went to England and France in 1981 to buy art and furnishings for herself, how or from whom did she get the funds? Based on the facts, only one reasonable source can be inferred: her son Porras. During the late 1970's and early 1980's, Porras had access to large sums of cash and the 1981 purchases would clearly have been within his means. Moreover, although Mrs. Blakley has considered herself a collector, the actual collector in the family has been Porras who parlayed his interest in things into a decorating business that, for a period of time, was very successful.

Finally, it is also extremely unclear why a woman approaching 70 years, even if she had the funds, would buy these 175 items for herself, when she had absolutely no obvious need for any of them and no place to store them. Why would she buy them and then deliver every single item to her son to be used in his home as furnishings or art or to be kept in his business as inventory? Under the circumstances, the best that can be said for Mrs. Blakley and her story is that she went on a pleasant trip across the Atlantic Ocean to buy things for her son and his business at his expense. If it were otherwise, the court would have expected to receive from her some evidence of bills of sale, shipping receipts or insurance documents substantiating the purchases. None was forthcoming. Her testimony on the 1981 purchases cannot thus be accepted as true. She failed to show the requisite interest in the property listed in Appendix D.

2.305 The Fur Coats

The Government seized 33 furs, with unknown value. Because some of the coats fit her, the court finds, without further analysis, the following items with the following descriptions belong to Mrs. Blakley and are thus awarded to her:

ITEM #	DESCRIPTION
3320	Yellow Thigh-Length
3323	Gray Thigh-Length
3328	Brown Jacket
3330	Brown Jacket
3332	Brown Full-Length
3334	Dark Brown Full-Length
3335	Black Full-Length
3339	Brown Jacket
3340	White Gray Jacket
3342	Brown Jacket

As to the rest of the furs, the court finds that no interest was shown as to Mrs. Blakley or the Trust and therefore all objections to the levy by the Government are denied. In fact, Kyle Perkins, who worked for Porras from May of 1981 to March of 1983, testified that Porras owned many furs, at least one of which was a gift from Edmiston. From the testimony and the court's examination of the furs listed on Appendix E, it is clear that Porras and, in one or two instances, Edmiston were owners of those furs. Therefore, Plaintiffs failed to show the requisite interest in the items described in Appendix E.

2.306 Lalique Furniture and Furnishings

As to the Lalique furniture and furnishings seized by the Government, Mrs. Blakley claimed in her testimony that all of it was hers. Porras testified that any Lalique purchases he made were for his customers, not for him. Both these statements lack credibility for several reasons.

Mrs. Blakley provided no information to explain how she obtained these glass pieces which are not inexpensive. She testified, for example, that in the 1980's she purchased a Lalique cyrus bowl with a present value of $3,000 (#3182), a Lalique persepolis bowl with a present value of $5,000 (#3183), 35 Lalique plates with a present value of $10,000 (#3186), a Lalique vase with the present value of $3,600 (#3194), and five Lalique ashtrays with a present value of $9,000 (#3195). All Lalique pieces, numbering 44 with a present value of $93,455, are listed on Appendix F. These are expensive items and Mrs. Blakley simply testified she bought them, without any further explanation. Her lack of substantial resources to purchase these items has already been chronicled in this Opinion and Order.

This problem of resources is further confirmed by a witness called by the Government, Dedrick Baxter, who testified that he met and then dealt with both Porras and Edmiston from 1984 to 1990. He recalled that both told him they were supporting their mothers and Mrs. Blakley's sister Mrs. Hayes. It makes sense that Porras was the main source of support for Mrs. Blakley in the 1980's, when he had access to substantial funds and when her Trust produced less than $2,000 per month, but it does not make sense that Porras would support his

mother in such extravagance that she could buy, for herself, very expensive art and furnishings, like the Lalique pieces, almost on a whim.

There was more testimony raising credibility problems in connection with Mrs. Blakley's claim to ownership of the Lalique pieces. One government witness, Kyle Perkins, who worked for Porras between 1981 and 1983, testified that one Lalique table was kept at the Oaklawn Park home and that another was kept at the office, both the domain of Porras. Another government witness, Victor Peters, who was a manufacturer's representative for Lalique, testified that he sold and installed a Lalique table for Porras in 1985. He also testified that Porras showed him a collection of Lalique pieces at the Oaklawn Park home which Porras identified as his own. From this testimony, it is clear that the person possessing the Lalique pieces and holding them out as his own was Porras, never Mrs. Blakley. The credible testimony therefore is that the Lalique collection listed in Appendix F belonged to Porras and that neither Mrs. Blakley nor the Trust had any interest whatsoever in any of the items.

2.307 Books

Mrs. Blakley claimed an interest in the 490 leather-bound books which were seized from the Oaklawn Park residence. She testified that the books were purchased at various times in various places by various people. Although a substantial number of the books were stamped with Porras's initials, Mrs. Blakley said that his stamp was used because she did not have one.

Again, this testimony is not credible and flies in the face of reason, logic and the facts. Identification stamps for books are not expensive. It takes little effort to get such stamps. If she owned the books, she should have had her initials placed on them. She not only failed to put her "stamp" on the books, but she also failed to possess the books. Her testimony in this regard, as with so many things, is simply eroded by her efforts to "own" property which is so clearly not hers. The accumulated failure of such efforts damages all her testimony. The court rejects all claims by Mrs. Blakley of an interest in the 490 books listed in Appendix G.

2.308 Gifts

Mrs. Blakley claimed that she owned expensive pieces of art, shown in Appendix H, which were gifts from Porras or, in one or two instances, from Edmiston. She also claimed that Porras gave her a 1930 Model A Ford Replica with a present value of $7,500. At times, however, as to some of this art, she said she did not have an interest in it and then had to be corrected by either Edmiston or Porras that the art was in fact hers. Examples are Items #848 and #849 which she said she did not own but which Edmiston said she did own as a result of gifts from Porras.

At the time of the seizure, as with everything else, Mrs. Blakley did not possess any of these art objects (or the car either). No gift tax returns were ever prepared for these "gifts" and clearly, as to some, gift tax returns would have been required. Examples are three paintings by the French artist DeBlass: #3153 with a present value

of $90,000, #3230 with a present value of $60,000 and #3273 with a present value of $50,000. There was no evidence that "delivery" was ever even made of any gift.

The "gifts" are questionable for an additional reason. Why would a mother's only child and expected heir give valuable objects to her during her senior years which would cause her estate to be burdened with substantial taxes and which would possibly prevent him from realizing the very inheritance she would wish for him? The most devoted of sons would certainly find a more rational way to please his mother. Even the most devoted of mothers would not want gifts under such circumstances. Therefore, for all the reasons stated, the court rejects Mrs. Blakley's claims of interest as to the art objects listed on Appendix **H** (as well as to the Model A Ford Replica).

2.309 Jewelry

At trial, Mrs. Blakley claimed an interest in a substantial amount of the jewelry the Government had seized at the Oaklawn Park residence. She said much of it came to her from Mr. Sinclair, Mr. Blakley, Porras or her father. Porras and Edmiston, the past and present residents at Oaklawn, claimed an interest in a limited amount of the jewelry.

The claims do not fit with the independent evidence on the subject. For example, Stephan Magner from Nieman Marcus in Dallas testified that, in the late 1970's and early 1980's, his store sold about $1,500,000 worth of jewelry to Porras. For example, Magner identified a custom-made hat band of gold, diamonds and emeralds as a piece he sold to Porras for Porras to place on his straw

hat (#3077 with a present value of $30,000). Magner testified that the hat band cost between $40,000 and $50,000. Mrs. Blakley testified that Porras gave it to her. As was the usual custom of son and mother, no gift tax return was filed. No evidence was presented that Mrs. Blakley ever possessed the hat band, even from time to time. From what the court could glean, the hat band was bought by Porras for himself with no true intention to give it to his mother or anyone else.

Similarly, Magner testified that his store made two gold coin necklaces for Porras (#3047 with a present value of $5,400 and #3064 with a present value of $2,200), both of which Mrs. Blakley said were given to her by her son. The reason for the gifts remained unexplained throughout the trial. In addition, Magner also testified that his store mounted stones for three rings for Porras (#3008, #3010 and #3018). Mrs. Blakley testified (1) that ring #3008 was hers although she didn't remember the details of her acquisition, (2) that ring #3010 came from New York, and (3) that ring #3018 was not hers. Without any concern for consistency, Porras testified that he had these rings mounted for his mother.

Magner was a credible witness. His testimony established that Porras spent enormous amounts of money on jewelry. Magner did acknowledge that Porras gave jewelry to others, including very expensive watches to the pilots of his private airplanes, but he also confirmed that Porras was a significant collector of jewelry as well as coins and art. Although Porras testified to the contrary, his denials are at odds with independent, credible evidence. Mrs. Blakley and Porras are not believable in connection with their claims about who are the real

owners of the jewelry. The court again rejects the claims of interest to another category of property, the jewelry, listed on Appendix I.[3]

2.310 Coins

Mrs. Blakley's claims of interest in the coins seized by the Government lack the same credibility that her above claims have lacked. As to one set of coins, she testified that she began collecting in the 1950's and 1960's although (1) she did not remember the name of the dealer who worked with her, (2) she did not know how to value coins and (3) she did not know anything about coins. It was merely something to do. As to another set of coins, she testified that she purchased them in the early 1970's through a New York coin dealer whom she did not remember. Another set of coins came from her father, who died over forty years ago.

This testimony flies in the face of all credible evidence. Mr. Magner testified that Porras was a coin collector. Mrs. Blakley admitted that she knew nothing about coins. The coins were under Porras's control in a much more real way than they were under her control. Further,

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[3] Mrs. Blakley testified that much of the jewelry came from Mr. Sinclair, her previous, deceased husband. The court has already rejected her claims to the "Sinclair" property, listed in Appendix C. An effort has been made throughout this Opinion and Order to avoid duplication from Appendix to Appendix and such an effort was made between Appendix C and Appendix G, but the court cannot state with absolute certainty that it has achieved perfect separation in light of the large number of jewelry pieces which were seized.

no explanation was ever given about the whereabouts of Porras's collection, which apparently was missed in the thorough seizure effort by the Government, if indeed both Porras and Mrs. Blakley were to be believed. Finally, if Mrs. Blakley's father possessed coins at his death, his executor did not find them. They are not listed on the Inventory and Appraisement of the Estate and, based on the small size of the Estate, they could not have been valued under any miscellaneous listing.

It is clear to the court that the seized coins, listed on Appendix J, belonged to Porras and that Mrs. Blakley's claim to an interest in the coins must be rejected.

2.311 China, Silver, Crystal, Flatware, Glass, Porcelain and Pottery

Mrs. Blakley claimed that she owned a substantial amount of the china, silver, crystal, flatware, glass, porcelain and pottery seized by the Government. In almost every instance, she never used or possessed this property. As to the silver, for example, she had some checks showing that she had purchased some isolated items. She also testified that she inherited or received by gift some silver items which laid the foundation for further collection.

Her testimony, however, was contradicted by Tom Simpson, Porras's employee, who stated that Porras claimed the silver as his own. It was also contradicted by Dorothy Marie Young, who worked for Porras and Edmiston in Dallas from 1979 to 1985 and who testified that, while Mrs. Blakley collected dolls, Porras collected

fine silver. Finally, it was contradicted by Karen McQuad, who is the property control manager for Christies in New York and who the Government called as a witness. She produced over one hundred pages of items, many involving beautiful silver pieces, which had been purchased by Porras between 1988 and 1990. *Government Exhibit 77.* Her firm could find no records that Mrs. Blakley had ever purchased anything from it.

There was also no showing that Mrs. Blakley had the means to collect or to store the silver or, for that matter, to collect or store the rest of the china, crystal, flatware, glass, porcelain and pottery in the great quantities that existed at the time of the seizure. On the contrary, the testimony of Simpson established that the real place of storage for and use of these items, especially the china, silver, crystal, flatware, glass and porcelain, was 28 Oaklawn Park, originally Porras's home and to this day Edmiston's residence. Furthermore, as to a substantial number of these items as with other items discussed in Paragraph 2.302, Mrs. Blakley's testimony was so ambivalent and equivocal that it did not amount to a claim at all. *See Appendix B.* For these reasons, Mrs. Blakley's claimed interest in the property listed on Appendix **K**, with a present value of $378,943.50, is rejected and denied.

2.312 Property at 28 Oaklawn Park

Although much of the property seized at 28 Oaklawn Park has been addressed in other paragraphs, the property at Oaklawn Park which has not yet been addressed in this Opinion and Order is found to belong to Porras,

not to Mrs. Blakley, regardless of her claims to the contrary. For example, in her Affidavit in Support of Plaintiffs' Original Petition and Sworn Application for Temporary Restraining Order and Preliminary Injunction dated November 12, 1994, Mrs. Blakley stated under oath that "[a]ll of the contents of the property located at 28 Oaklawn, Midland, Midland County, Texas are owned by me or the Lucille Christie Blakley Trust . . . " Given what the court heard and saw in the trial of this case, this claim must be rejected.

To begin with, the court is at a loss to understand how Mrs. Blakley could claim that "all of the contents" were either hers or the Trust's when, even accepting everything else the Plaintiffs have said as being true, it is still clear that "all of the contents" could not possibly have belonged to her or the Trust. Her own testimony, as well as that of Porras and Edmiston, contradicted her. The testimony of Dorothy Young, who once worked for Porras, also contradicted her. For example, Item #1600, a bronze piece located at Oaklawn Park and therefore belonging to Mrs. Blakley based upon her affidavit, came from the inventory in Porras's Leland Ingram showroom in Dallas, according to Young. This is but one more example of why Mrs. Blakley's testimony, almost *in toto*, must be disregarded.

There are other reasons as well. Mrs. Blakley never lived at Oaklawn Park, although she did visit there occasionally. Until he conveyed the residence to the Trust (in a transaction which has questionable motivations), Porras held record title. After the conveyance, he still had full run of the home. There was no testimony that the conveyance of the residence caused any property to be moved or

that the conveyance changed any title to any property in any way. Any claim of Mrs. Blakley to an interest in the Oaklawn property lacks credibility, conflicts with the believable evidence and must be rejected. *See Appendix L.*

2.313 Trust

On behalf of the Trust, Edmiston claimed an interest in 342 items of property with a present value of $144,281.00. *See Appendix M.* This property was allegedly owned by the Trust for its interior decorating business. The court rejects this claim as untenable because it is not supported by credible testimony.

Part of the legal arguments by both sides in this case related to whether the Trust was the alter ego or nominee of Porras. Was the Trust simply a front for Porras so that he could continue his decorating business outside the reach of the Internal Revenue Service? The court would have been required to reach the alter ego or nominee issue had the Trust presented credible evidence of its interest in the claimed property. The Trust failed, however, to do so.

One example will suffice to illustrate the failure. On behalf of the Trust, Edmiston claimed a painting by Christopher H. Shearer (#2904). As to that item, Karen McQuad, the property control manager for Christies, testified that her firm sold it to Porras on May 31, 1990. *See Government Exhibit 77 (pp. 122-26).* McQuad testified to a substantial number of purchases by Porras between 1988 and 1990, the beginning years of the Trust, and not one purchase was in the name of the Trust. In fact, according to her, Christies had no record of any purchases by either

Mrs. Blakley or the Trust at all. The Trust's claim to the Shearer painting, like its claims to all the property seized by the Government, was conveniently unsupported by records; Christie's records proved that, in one clear instance, the claim of an interest in the painting at issue had no validity.

The court does not take the position that an interest in property must be supported by records. However, when testimony is presented by witnesses with little credibility, then corroboration becomes essential. Moreover, as a practical matter in today's business world, records are critical to the sound operation of any enterprise. Records enable companies to establish lawful ownership, determine profits and losses, and generally to conduct affairs in a proper manner. This court has already noted its dismay over the lack of record-keeping by the Trust. Such a failure, being so out-of-the-ordinary, calls into further question every claim by Edmiston for the Trust. It is difficult for a fact-finder to give serious consideration to a claim when it conflicts with reason, logic and common sense. The presentation was not credible. It needed corroboration; none was forthcoming.

There are other reasons as well to reject the claims of the Trust. Edmiston, on the Trust's behalf, often claimed an interest in the same item of property to which Mrs. Blakley claimed an interest. It is not required that witnesses, to be believed, testify in court in perfect symmetry with one another. When, however, the testimony of witnesses comes into conflict too often under too many questionable circumstances, credibility suffers. Such is the testimony of Edmiston and Mrs. Blakley.

Before ending this discussion, one further comment is in order. At trial, Plaintiffs seemed to take the position that it was a foregone conclusion that the Trust had shown some interest in the property it claimed. After all, the Trust was in the interior decorating business. It needed property, the argument goes, to do its business. Moreover, since the Government pleaded and argued alter ego/nominee issues to the court, does it not follow that the Government conceded that some interest must have been shown by the Trust? As to the first argument, interior decorators do not need to have stores or showrooms to do their work. As to the second argument, while it is true that the alter ego/nominee issue was urged by the Government as a reason that the court should deny Plaintiffs' claims, the court does not believe that the Government's arguments can be construed as a concession or stipulation that the Trust successfully proved some interest in the seized property. It was, in fact, the Government who hotly contested the credibility of Plaintiffs' witnesses and who, in the end, convinced the court, through its own proof, that those witnesses could not be believed.

The Trust failed to present credible evidence of an interest in the property it claimed. Therefore, the court finds that the Trust failed to show an interest in the property listed in Appendix **M** and thus holds that all claims of the Trust are denied.

3.314 Porras/Edmiston Property

Porras and Edmiston admit to an interest in only 91 items of the almost 4,000 items seized by the Government. This amounts to basically two percent (2%) of the total seizure. The court has heard and seen many things in the trial of this case that have damaged the credibility of Porras and Edmiston, but the single fact that these two men admit to only a tiny interest in the seized property is perhaps most damaging of all.

For years, Porras has held himself out to be a consummate collector of art, fine furnishings, exquisite dinnerware, beautiful jewelry and expensive cars. Witness after witness called by the Government testified in detail to these facts. Yet, as Porras's story goes, after he fell into an argument with the tax collector, his entire estate essentially disappeared and, almost coincidentally, his mother and her Trust ended up with a treasure trove amounting to millions of dollars of property. The story and the facts simply do not fit together.

The court realizes that its findings and holdings in this matter are a rejection of most of what the Plaintiffs offered at trial. After much deliberation, however, the court is convinced that its rejection is justified. Plaintiffs came to trial with claims and evidence that were not credible and not believable; a clear example is the position by Porras and Edmiston that only two percent of the property seized in this matter belonged to them. Under all the circumstances, such a position is untenable. Their admission, of course, entitles the Government to the 89 items listed in Appendix N. It does much more, however; it reaffirms the court's credibility judgments.

3.0 Actions for Violations of Constitutional Rights, Conversion and Trespass

In addition to their action for wrongful levy, Plaintiffs have also sued for violations of constitutional rights, conversion and trespass.

3.1 Torts

Plaintiffs' tort actions for conversion and trespass are clearly barred by the doctrine of sovereign immunity. In order to sue the United States for torts, a plaintiff must comply with the Federal Tort Claims Act, 28 U.S.C. § 2671, unless the statute provides otherwise. The Federal Tort Claims Act does not waive sovereign immunity here because any "claim arising in respect of the assessment or collection of any tax" is expressly barred by 28 U.S.C. § 2680(c). Therefore, Plaintiffs' remedy in a suit for conversion and trespass in this matter had to comply with the requisites of the Federal Tort Claims Act. Plaintiffs have not complied with the Act; accordingly, their suit for conversion and trespass is dismissed.

3.2 Constitutional violations

Likewise, Plaintiffs' actions for constitutional deprivations under the Fourth and Fifth Amendments to the Constitution must fail. To begin with, it is clear that the Plaintiffs have already sought their sole relief in this matter under 26 U.S.C. § 7426.

The Fifth Circuit in *Baddour v. United States,* 802 F.2d 801 (5th Cir. 1986), has held that a person who is alleging a wrongful levy has the remedies provided in Section

7426 of the Internal Revenue Code as their sole remedy. The court stated that:

> [a] person alleging that his property has been wrongfully levied upon has an opportunity for full judicial consideration, in an adversary context of the validity of the levy. More than that the Constitution does not guarantee.

802 F.2d at 807. The Fifth Circuit further stated that

> . . . creation of a damages remedy under circumstances where Congress has provided for corrections of tax collection errors could wreck [sic] havoc with the federal tax system.

802 F.2d at 807. In reaching this conclusion, the Fifth Circuit cited that Seventh Circuit's decision in *Cameron v. Internal Revenue Service,* 773 F.2d 126 (7th Cir. 1985), where the Seventh Circuit stated that a complaint for damages based upon an alleged constitutional tort may be dismissed for failure to state a claim either because (1) no constitutional source for the plaintiff's claim exists, or (2) Congress has created explicit remedies or (3) a court-created remedy would interfere with the effective functioning of government.

Although Plaintiffs argue otherwise in support of their position, the court believes that they misconstrue the authorities. For example, they cite *Terrapin Leasing, Ltd. v. United States,* 449 F. Supp. 7 (W.D. OK. 1978) to bolster their argument that they can sue the Government, but the case actually held that *no* cause of action exists against the United States for alleged constitutional violations due to the doctrine of sovereign immunity. The Supreme Court in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), also cited

by Plaintiffs, held that agents of the federal government may be sued in their individual capacity for constitutional violations to the extent they exceed their scope of authority. The Plaintiffs' assertion that *Bivens* stands for the proposition that the United States may be sued for constitutional violations is therefore off target. *See also Davis v. Passman,* 442 U.S. 228 (1979) (holding that a lawsuit may be brought against an individual congressman charged with sexual discrimination under the Constitution); *Bolling v. Sharpe,* 347 U.S. 497 (1954) (holding that children of Washington D.C. cannot be denied admission to the public schools because of their race); *Carlson v. Green,* 446 U.S. 14 (1980) (holding against prison officials for constitutional violations resulting from the death of an inmate while in custody).

The Plaintiffs' reliance on *Rutherford v. United States,* 702 F.2d 580 (5th Cir. 1983) is also misplaced. In *Rutherford,* the Fifth Circuit remanded the case to the District Court so that it could determine whether an Internal Revenue Service agent in the case violated the taxpayers' constitutional rights by acting outside the scope of his authority. The case does not stand for the proposition that the United States may be sued for constitutional violations.

Another case cited by Plaintiffs, *Smith v. United States,* 458 F.2d 1231 (9th Cir. 1972), is also not on point. In *Smith,* the Internal Revenue Service seized a warehouse owned by a third-party to recover goods inside which were owned by the delinquent taxpayer. The Internal Revenue Service would not let the landlord into the property even though the landlord did not owe the Internal Revenue Service any taxes. The Court held that the

Internal Revenue Service certainly had the right to seize the taxpayers' property, but that it had no right to lock the landlord out of his property.

In the case before this court, the Internal Revenue Service seized items in a warehouse that was owned by Midwestern Warehouses, Inc. and leased to HWD, a Porras controlled entity which is also deeply indebted to the Internal Revenue Service. At no time did the Government deny the landlord entry into the warehouse. Moreover, the Internal Revenue Service did not use the landlord's property for a storage facility without compensation. Instead, it leased a warehouse in Midland to store the items that were seized. Accordingly, the *Smith* case does not apply.

The Plaintiffs have brought this lawsuit against the United States of America. They have not sued any government employees in their individual capacity. Since Congress has provided the Plaintiffs with remedies pursuant to Section 7426 of the Internal Revenue Code, their constitutional claims fail.

3.21 The Fourth Amendment Allegations

Although the Plaintiffs conceded that the Government may obtain orders on an *ex parte* basis to effectuate the collection of its tax liabilities, they claim here that the Government still violated their Fourth Amendment rights. In support of their position, the Plaintiffs cite the case of *GM Leasing Corporation v. United States,* 429 U.S. 338 (1977). However, *GM Leasing* stands for another proposition: it states that the Internal Revenue Service must apply to the court and obtain a writ of entry or warrant

before it enters into a residence of a taxpayer. The Internal Revenue Service met the requirement set out in *GM Leasing*. It obtained a valid Writ of Entry from the United States Magistrate Judge prior to effectuating the seizure of the property of Porras and Edmiston.

The Plaintiffs further claim that the affidavit of Milton Patrick is defective and the Internal Revenue Service did not have probable cause and the writ should not have been issued. Patrick's affidavits are in evidence as Plaintiffs' Exhibit 12. The United States Magistrate Judge concluded, however, that the application to obtain the writ of entry was sufficient and this court agrees. The Magistrate Judge's determination will thus not be disturbed.

In *Phillips v. Commissioner*, 283 U.S. 589, 596-597 (1931), the court rejected a constitutional challenge to the statutory system under which the taxes may be collected summarily without a pre-seizure judicial hearing. It was held that as long as there was an adequate opportunity for a post-seizure determination of the taxpayer's rights, the statute met the requirements of due process. *See Commissioner v. Shapiro*, 424 U.S. 614, 630-633 (1976).

The Internal Revenue Service did not violate the Fourth Amendment because it obtained a writ of entry prior to the seizure of Porras's and Edmiston's property. In the *Matter of Brown*, 84-2 USTC ¶ 10,002 (D. Utah 1984), the District Court held that the standard for issuing an Internal Revenue Service writ of entry is not the same as a criminal warrant. Instead, the affidavit of the Internal Revenue Service must establish that the Government has the right to levy and seize assets of the taxpayer because the assessment has been made, the notice of assessment

has been given, the Internal Revenue Service has demanded payment from the taxpayer and the taxes have still not been paid. Furthermore, the Government must establish there is probable cause to believe that there are assets which may be seized on the premises to be entered. *See also, In the Matter of Coppola,* 810 F. Supp. 429, 434 (E.D.N.Y. 1992), *aff'd* 1995 WL 760573 (2d Cir. 1995). In *Coppola,* the District Court held that the Government only needed to demonstrate in its affidavits that there was probable cause that the place to be entered contained sizeable goods and that there was probable cause to connect the assets seized to the taxpayer. 810 F. Supp. at 434.

3.22 The Fifth Amendment Argument

It also appears that the Plaintiffs are complaining that they did not have the right to be heard prior to the seizure by the Internal Revenue Service. Since the Plaintiffs have an appropriate post-seizure remedy, a wrongful levy action pursuant to 26 U.S.C. § 7426, they do not have the right to be heard prior to the Internal Revenue Service seizure. In *The Matter of Carlson,* 580 F.2d 1365 (10th Cir. 1978), the court stated that:

> [t]he policies favoring expeditious tax enforcement procedures are as compelling as the need to effect a speedy search of a suspect's premises. To allow a taxpayer to tie up the initial enforcement proceedings after he has been given notice of the jeopardy assessment most assuredly would subvert the statutory purpose of the jeopardy assessment provisions. By delaying

> enforcement a taxpayer could secrete or dissipate what assets he had left. The government's interests moreover cannot be adequately protected merely by sealing the safe deposit box. The government must be able to search the contents of the box to determine the value of what is there and to learn what other assets the taxpayer may have elsewhere. We refuse to sanction the impeding of these investigatory functions and the concomitant frustration of the jeopardy assessment procedure which would result from intervention by the taxpayer in the pre-seizure enforcement proceedings.

580 F.2d at 1374.

In *United States v. Shriver*, 645 F.2d 221, 222 (4th Cir. 1981), the Court held that judges, in reviewing writs of entry affidavits, should simply determine whether the application and supporting affidavit showed probable cause to enter, search for, and levy upon personal property in aid of summary collection of assessed and unpaid taxes. The Court also held that the proceeding should not be converted into an adversary one or prolonged over a period of years while taxes presumptively due and owing remain uncollected.

Again, Plaintiffs attack the affidavit of Patrick. *See Plaintiffs' Exhibit 12*. However, his affidavit meets the requirements set forth in *Coppola* and *Brown*. The affidavit indicated that an assessment of income taxes had been made. Notice and demand upon Porras had been made and the taxpayer had refused to pay the tax. The affidavits show that there was probable cause to believe that property subject to the levy was in the place to be searched. For example, paragraph 7 of the affidavit to

enter 28 Oaklawn Park provides in part that "A former employee has furnished us with information that would indicate that there are sufficient assets belonging to the taxpayer to warrant seizure action. Many of the assets are considered to be collectibles, i.e. paintings, bronzes, crystal, silver, antiques and jewelry." The affidavit showed the connection between Porras and the property by stating that the house at 28 Oaklawn Park was Porras's residence. Even if Porras was living in New Mexico at the time of the seizure, the Oaklawn house was certainly his residence whenever he was in Midland. Moreover, the proof at trial showed that the affidavit was accurate; the Government located virtually all of the type of items set forth in the affidavit at the house, warehouse, and office. Plaintiffs' Fifth Amendment argument therefore fails.

4.0. Summary

Based upon the findings and conclusions stated in this Memorandum Opinion and Order, it is hereby ORDERED, ADJUDGED AND DECREED that Plaintiffs' Complaint seeking redress for wrongful levy, constitutional violations, conversion and trespass is dismissed.

It is further ORDERED, ADJUDGED AND DECREED that Plaintiffs' request for injunctive relief is denied.

It is further ORDERED, ADJUDGED AND DECREED that all costs are taxed against Plaintiffs.

It is further ORDERED, ADJUDGED AND DECREED that all pending motions are denied as moot.

SIGNED this 12th day of September, 1996.

/s/ Royal Furgeson
ROYAL FURGESON
UNITED STATES DISTRICT JUDGE

[Appendices To Opinion
Have Been Lodged With The Clerk]